State Vs Parsottam Bhikhabhai

Court: Bombay High Court

Date of Decision: July 24, 1957

Acts Referred: Evidence Act, 1872 â€" Section 32
Penal Code, 1860 (IPC) â€" Section 302

Citation: (1958) 60 BOMLR 153

Hon'ble Judges: M.C. Chagla, C.J; Tendolkar, J; S.T. Desai, J

Bench: Full Bench

Judgement

M.C. Chagla, C.J.
Mr. Justice Chainani and Mr. Justice Palnitkar have referred the following question to this full bench:

Whether the statement made by a deceased person as to the cause of his death, or as to any of the circumstances of the transaction, which resulted

in his death, is inadmissible in evidence, if there is no record of the questions put to the deceased and the answers given by the deceased to each of

those questions.

The question came to be referred under the following circumstances. An appeal was preferred by an accused who was convicted u/s 302 of the

Indian Penal Code on the charge of committing murder of one Gajri on July 23, 1956. That appeal came before Mr. Justice Chainani and Mr.

Justice Palnitkar. The principal evidence in that case was the dying declaration made by Gajri and this declaration was recorded by the Taluka

Magistrate, Navsari, on July 23, 1956. The declaration was a continuous statement and there was no record of the questions put by the learned

Magistrate to the deceased. It was urged on behalf of the accused that the declaration was inadmissible and for that purpose reliance was placed

on a decision of this Court reported in Shrinath Durgaprasad v. State (1956) 59 Bom. L.R. 221. Mr. Justice Chainani and Mr. Justice Palnitkar

felt some difficulty in accepting that judgment, and hence they referred this question to a full bench.

2. Now, the question that really arises is as to the proper interpretation of Section 32(1). Section 32 constitutes an exception to the general rule

that hearsay evidence is not admissible and Section 32 refers to different statements which have been made relevant and therefore admissible

although they are hearsay evidence. Section 32 is divided into eight sub-clauses and these sub-clauses deal with the nature of the statements

referred to in this section. Sub-clause (1) makes a statement relevant which is made by a person as to the cause of his death, or as to any of the

circumstances of the transaction which resulted in his death, in cases in which the cause of that person''s death comes into question, and when we

turn to the operative part of Section 32 it provides:

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving

evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to

the Court unreasonable, are themselves relevant facts in the following cases:

Therefore, it is clear that a statement, if it falls under any of the eight sub-clauses of Section 32, is relevant, whether the statement is written or

verbal, and what is contended on behalf of the accused who is represented by Mr. Shastri, who has urged before us all the relevant considerations,

is that the only statement made relevant is a statement which consists of the verba ipsissima of a person making a statement. It is urged that in order

that the statement should be relevant the actual words used by the person making the statement should be proved. If the actual words are not

proved, the statement is not relevant and, therefore, not admissible.

3. Now, in applying any canon of construction for construing Section 32 it must be borne in mind that the same canon of construction must apply

not only to Sub-clause (1) but to the other sub-clauses in Section 32, and if we accept the contention of Mr. Shastri, the inevitable result must be

that in every one of the cases referred to in Section 32 a statement must be ruled out unless the Court is satisfied that the statement consists of the

verba ipsissima of the person making the statement. It is true that Section 32(1) in a majority of cases comes into operation in criminal cases, but

the other sub-clauses are clauses which are constantly requisitioned in civil cases. Take for instance the case of Sub-clauses (5) which relates to

the existence of relationship and the statement is made by a person who has special means of knowledge with, regard to the relationship. What the

law requires is that the statement which is relevant must fall within one of the cases set out in Sub-clauses (1) to (8). Whether that statement should

be acted upon, whether that statement has evidentiary value, whether that statement is reliable, are all considerations which do not go to the

question of admissibility but to probative value. The statement may be a written statement, in which ease the writing constitutes the evidence; the

statement may be oral, in which case it may be proved by a witness who heard it or it may be proved, by a person who reduced it to writing and

he may produce the writing as the evidence of the statement he has taken down. But whether the statement is correctly reproduced, whether the

statement is the result of questions unfairly put or questions which were considered as leading questions, these are all circumstances which any

Court admitting the statement must take into consideration. A statement may be so taken down that it may be worthless as evidence and no

criminal Court would be justified in placing the slightest reliance upon it. But even so, the statement as falling u/s 32 is relevant and admissible. It is

only after we have passed the stage of admissibility that the question arises which the Court has to decide, viz., what is the evidentiary value of that

statement. How good or how bad the statement is must depend upon various circumstances : Who is the person who recorded it, what is the

nature of the evidence he gives, under what circumstances and by what means he got the person to make the statement. But to suggest, as Mr.

Shastri suggests, that unless we have the actual words of the person making the statement, the statement cannot be admitted into evidence, is to

make a suggestion which would make Section 32(1) in a majority of cases a dead letter. Take one or two instances. A man has been seriously

stabbed and it is a question of a few minutes before he departs from this world and he wants to make a statement. According to Mr. Shastri, the

person who takes down the statement must reduce to writing the questions that he has put and the exact answers which he has got from the injured

person. But unfortunately death does not wait for the convenience of anyone and not even to see that the provisions of the Evidence Act are

complied with. Therefore, in these circumstances, according to Mr. Shastri, if the person taking down the statement takes down the gist of it or

takes down as much as is possible realising that life is ebbing away, the statement would become inadmissible. Take another case where a man is

making a statement in a language which cannot be taken down by a person who is taking down the statement. He may take it down in English

though he may understand the language spoken by the person who is making the statement. In this case also, according to Mr. Shastri, the

statement will be inadmissible because the statement does not contain the actual words used by the person making the statement.

4. Therefore, in our opinion, apart from authority, it is not possible to put a construction upon Section 32 which in its very nature is a strained

construction and which construction becomes even more difficult to put when one realises that Section 32(1) does not stand by itself but it is part

of a section which contains other cases where statements may be made and proved in a Court of law.

5. Turning to the authorities, the Government Pleader has told us that he has been unable to come across any decision of any High Court in India

which has taken the view that a statement u/s 32(1) is inadmissible if it does not contain the actual words used by the person making the statement,

and the only exception is the decision of this High Court which has necessitated this full bench. Turning to that decision reported in Shrinath

Durgaprasad v. State, it is really based on an English case Reg. v. Mitchell (1892) 17 Cox. 503. In that case the view was taken by Mr. Justice

Cave that a statement giving the substance of questions put to, and answers given by, the deceased person was not admissible in evidence as a

dying declaration and that such a declaration must, in order that it may be admissible in evidence, be in the actual words of the deceased, and if

questions are put, the questions and answers must both be given, in order that it may appear how much was suggested by the examiner and how

much produced by the person making the declaration. Now, with very great respect to the Bench that decided Shrinath Durgaprasad''s case, they

seem to have overlooked the fact that Reg. v. Mitchell is no longer good law in England. They have also, again with respect, overlooked the fact

that the decision in Reg. v. Mitchell did not merely turn on the inadmissibility of the statement on the ground mentioned by Mr. Justice Cave but

also on the ground that the statement was not made in immediate expectation of death, a ground which is not relevant as far as Section 32 is

concerned.

6. Turning to the law in England, we cannot do better than turn to the leading text book, Archbold''s Criminal Pleading, Evidence & Practice, and

at p. 381 the learned author points out:

It was formerly held to be no objection against a declaration which had been reduced into writing that it was made in answer to questions put to

the deceased, and was not a continuous statement made by him.

Then he refers to two cases-Rex v. Fagent (1835) 7 C. & P. 238 and Reg. v. Charlotte Smith (1865) 10 Cox 82. It is rather instructive to turn to

this decision of Reg. v. Charlotte Smith, because it appears from this case that the trial Judge, when counsel objected to the dying declaration going

in on the ground that it was in answer to leading questions and therefore it was not a voluntary statement, consulted the learned Chief Justice and

after consulting him he informed the counsel that the evidence was admissible. This clearly shows that as far back as 1865 the practice was clear

that even though a statement may be the result of leading questions, the dying declaration was admissible and the only question that had to be

considered was the weight to be attached to it. Then came the decision in Reg v. Mitchell, which as pointed out by Griffith C.J. in Reg. v. Corbett

(1903) QS 246, unsettled what had before been the law. Then we come to the recent decision in Rex v. Bottomley (1922) 115 L.T.J. 88, which is

also referred to by Archbold, where Lawrence J. ruled that a dying declaration in the form of question and answer was admissible, although the

answers only and not the questions had been taken down. Therefore, as far as the English law is concerned, again with respect to the learned

Judges who decided the case in Shrinath Durgaprasad v. State, whatever Rex v. Mitchell might have laid down, the law today is that a dying

declaration is admissible although it may consist of merely the answers given by the declarant and may not contain the record of the questions put

to which the answers were given.

7. Now, this decision in Reg v. Mitchell was relied upon in a Calcutta judgment in Emperor v. Premananda Dutt ILR(1925) 52 Cal. 987, and Mr.

Justice Vyas and Mr. Justice Palnitkar have also relied on this decision. In our opinion, this decision far from supporting the proposition for which

Mr. Shastri contends is entirely opposed to it. The Court of appeal in the Calcutta High Court were considering a dying declaration where all the

questions put by the Magistrate were not recorded, though the answers were recorded, and at p. 1004 Mr. Justice Mukerji says:

Ã¯Â¿Â½The Jury heard him (i.e. the Magistrate) and they had also the record of the dying declaration before them and it was a matter entirely within the

province of the Jury as to what value they should attach to it.

Therefore, it is clear that according to the Calcutta High Court, any infirmity that may attach to the dying declaration by reason of the fact that only

the answers are recorded and not the questions or all the questions, is a matter for consideration when the Court or the jury is considering the value

to be attached to that evidence and it is not an infirmity that renders the evidence itself inadmissible.

8. The same principle has been enunciated by this Court in an earlier decision in Emperor Vs. Akbarali Karimbhai, . In that ease Sir John

Beaumont C.J. and Mr. Justice N.J. Wadia were considering a dying declaration and whether it was inadmissible evidence, and Sir John

Beaumont in his judgment points out that he was unable to see the particular distinction which was sought to be drawn between a dying declaration

and other forms of evidence (p. 1023):

Ã¯Â¿Â½What Section 32 of the Indian Evidence Act does is to make certain declarations relevant which under the ordinary law would be irrelevant as

being hearsay. Once you find that a declaration falls within Section 32 it becomes relevant evidence, and it seems to me that the Court must judge

of the weight of that evidence on exactly the same principles as those upon which it acts in judging of the weight of other types of evidence.

The same note has been sounded by the Supreme Court in a recent judgment reported in Ram Nath Madhoprasad and Others Vs. State of

Madhya Pradesh, Mr. Justice Mahajan, as he then was, delivering the judgment of the Court and dealing with a certain dying declaration observes:

Ã¯Â¿Â½The High Court made no reference to these statements and did not take into consideration the oral dying declaration of the deceased in arriving

at its conclusion. In our opinion, unless one is certain about the exact words uttered by a deceased, no reliance can be placed on verbal statements

of witnesses and such oral declarations made by a deceased.

Therefore, in the opinion of the Supreme Court, if the exact words were not proved, it might be a ease where no reliance should be placed upon

the dying declaration, but it is certainly not a case of ruling out the dying declaration as inadmissible.

9. In Durgaprasad"s case, Vyas J. in the judgment of the Court at p. 226 states:

Ã¯Â¿Â½It is, therefore, essential, in our view, for proper compliance with the provisions of Section 32 of the Indian Evidence Act to record the

questions in the precise words in which the questions are put and take down the answers in the actual words in which the answers are given, when

the statement is the result of questions put and answers given.

We regret that we are unable to agree with this statement of the law. In any view of the case, it is difficult to understand how the questions put

constitute a part of the statement which is relevant u/s 32.

10. In our opinion, therefore, with respect, the decision in Shrinath Durgaprasad v. State was not correctly decided, and we would answer the

question submitted to us in the negative. The appeal will go back to the criminal bench for final disposal.